No. 16-711

IN THE

Supreme Court of the United States

THE STATE OF OHIO,

Petitioner,

v.

ADRIAN L. HAND, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ohio Supreme Court correctly concluded that the *Apprendi* exception for "prior convictions" does not apply to prior juvenile adjudications in which the accused lacked the right to a jury trial?

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RESTATEMENT OF THE CASE

Ohio law provides a mandatory minimum term of imprisonment when certain aggravating factors or triggering conditions are met. As relevant here, Ohio Revised Code § 2929.13(F)(6) mandates a prison term for "a first or second degree felony . . . if the offender previously was convicted of or pleaded guilty to . . . any first or second degree felony." And Revised Code § 2901.08(A) provides that a juvenile adjudication—for which there is no right to a jury trial—is the equivalent of an adult conviction for purposes of triggering § 2929.13's mandatory term of incarceration.

After entering no-contest pleas to first- and-second-degree felonies, Respondent Adrian Hand was sentenced to a mandatory prison term under § 2929.13(F)(6) because he had a prior juvenile adjudication. Under § 2901.08(A), Ohio law considered Mr. Hand's juvenile adjudication to be equivalent to an adult conviction for a first- or second-degree felony. Mr. Hand argued that using the prior juvenile adjudication to enhance his sentence without proving it to the jury beyond a reasonable doubt violated due process and his right to a trial by jury under both the Ohio and U.S. Constitutions, because he did not have the right to a jury trial during his earlier juvenile adjudication. App. 3a–4a. Specifically, while Mr. Hand did not dispute that three years of his six-year term were mandatory (pursuant to provisions of Ohio law not relevant here), he argued that treating the remaining three years as mandatory on account of his prior juvenile adjudication was unconstitutional. The Ohio Supreme Court agreed. App. 2a.

REASONS FOR DENYING THE PETITION

This Court has denied at least 19 prior petitions for certiorari raising the same question presented here. Nothing about this case differs from these numerous, previously denied petitions, and in any event, the Ohio Supreme Court's decision was correct. This case does not warrant further review.

I. THIS COURT HAS CONSISTENTLY DECLINED TO REVIEW THE QUESTION PRESENTED

Since 2003, this Court has repeatedly and consistently declined to decide whether a juvenile proceeding without the right to a jury trial constitutes "a prior conviction" for purposes of *Apprendi*. *See, e.g.*, *Welch v. United States*, 604 F.3d 408 (7th Cir. 2010), *cert. denied*, 564 U.S. 1018 (2011) (mem.); *United States v. Wright*, 594 F.3d 259 (4th Cir.), *cert. denied*, 562 U.S. 1006 (2010) (mem.); *United States v. McCray*, 277 F. App'x 874 (11th Cir.), *cert. denied*, 555 U.S. 1014 (2008) (mem.); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007), *cert. denied*, 552 U.S. 1105 (2008) (mem.); *United States v. Matthews*, 498 F.3d 25, 34–36 (1st Cir. 2007), *cert. denied*, 552 U.S. 1238 (2008) (mem.); *United States v. Kirkland*, 450 F.3d 804 (8th Cir.), *cert. denied*, 549 U.S. 968 (2006) (mem.); *United States v. Burge*, 407 F.3d 1183, 1190–91 (11th Cir.), *cert. denied*, 546 U.S. 981 (2005) (mem.); *United States v. Robinson*, 95 F. App'x 197 (8th Cir.), *cert. denied*, 543 U.S. 890 (2004) (mem.); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003), *cert. denied*, 540 U.S. 1150 (2004) (mem.); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003) (mem.); *People v. Nguyen*, 209 P.3d 946 (Cal. 2009), *cert. denied,* 559 U.S. 1067

(2010) (mem.); *People v. Buchanan*, 49 Cal. Rptr. 3d 137, 145 (Cal. Ct. App. 2006), *cert. denied*, 551 U.S. 1107 (2007) (mem.); *State v. Weber*, 149 P.3d 646, 649–53 (Wash. 2006) (en banc), *cert. denied*, 551 U.S. 1137 (2007) (mem.); *State v. Sasouvong*, 129 Wash. App. 1035 (Wash. Ct. App. 2005), *cert. denied*, 552 U.S. 816 (2007) (mem.); *Ryle v. State*, 842 N.E.2d 320, 321–23 (Ind. 2005), *cert. denied*, 549 U.S. 836 (2006) (mem.); *State v. Brown*, 879 So. 2d 1276, 1290 (La. 2004), *cert. denied*, 543 U.S. 1177 (2005) (mem.); *People v. Lee*, 4 Cal. Rptr. 3d 642, 646–47 (Cal. Ct. App. 2003), *cert. denied*, 542 U.S. 906 (2004) (mem.); *People v. Superior Court*, 7 Cal. Rptr. 3d 74, 82–86 (Cal. Ct. App. 2003), *cert. denied*, 543 U.S. 884 (2004) (mem.); *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003) (mem.).

This Court has denied certiorari where, as here, the petitioner was the State. *See* Pet. for Writ of Certiorari, *Louisiana v. Brown*, No. 04-770, 2004 WL 2804798 (U.S. Dec. 2, 2004) (seeking writ of certiorari on behalf of the State of Louisiana), *cert. denied*, 543 U.S. 1177 (2005) (mem.). The Court has even denied certiorari in the face of acquiescence by the United States. *See* Br. for the U.S., *Smalley v. United States*, No. 02-6693, 2002 WL 32063329, at *6 (U.S. Dec. 13, 2002) ("The petition for a writ of certiorari should be granted."), *cert. denied*, 537 U.S. 1114 (2003) (mem.). *See also* Br. for the U.S. as *Amicus Curiae*, *Hitt v. Kansas*, No. 01-10864, 2002 WL 32135631 (U.S. Dec. 13, 2002) (suggesting that the Court grant certiorari in *Smalley* and hold *Hitt*), *cert. denied*, 537 U.S. 1104 (2003) (mem.).

Nothing about this case distinguishes it from the numerous previous instances in which this Court has denied certiorari. It should do so again here.

II. THE OHIO SUPREME COURT'S DECISION WAS CORRECT

Review is also not warranted because the Ohio Supreme Court's decision was correct.

1. Generally, facts that increase a sentence above a statutory maximum or elevate a mandatory minimum must be proven to a jury beyond a reasonable doubt. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 477–78 (2000). *Apprendi* recognized a narrow exception to this general rule: only "the fact of a prior conviction" may be used to increase a defendant's sentence above a statutory maximum (or, after *Alleyne*, elevate a mandatory minimum) without being proven to a jury. 530 U.S. at 490.

Apprendi's exception for prior convictions is grounded in this Court's earlier decisions in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) and *Jones v. United States*, 526 U.S. 227 (1999). *See* 530 U.S. at 487–90 (discussing both). In *Almendarez-Torres*, this Court reasoned that prior convictions are not elements of a crime, and therefore held that they need not be pled to a jury before they could be used to increase a punishment beyond a statutory maximum. 523 U.S. at 227. *Jones* explicated the basis for *Almendarez-Torres*'s distinction between recidivism and other sentence-enhancing facts: "unlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have

been established through procedures satisfying the fair notice, reasonable doubt, and *jury trial guarantees*" of the U.S. Constitution. 526 U.S. at 249 (emphasis added).

The Court recognized that recidivism may be used to enhance a sentence because sufficient procedural safeguards generally ensure that the prior conviction was trustworthy and reliable. Indeed, *Apprendi* noted that the "certainty" that these three procedural safeguards were in place for any prior conviction "mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." 530 U.S. at 488. And *Apprendi* specifically identified the right to a jury trial as one of the key procedural protections that mitigated those due process and Sixth Amendment concerns: "[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had *the right to a jury trial* . . . and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 496 (emphasis added).

Conversely, as the Ohio Supreme Court properly recognized, if a prior conviction was *not* obtained "in a proceeding in which the defendant had the right to a jury trial," due process and the Sixth Amendment require that any fact increasing a sentence beyond a statutory maximum or elevating a mandatory minimum must be proven to a jury beyond a reasonable doubt. *See id.*; *Alleyne*, 133 S. Ct. at 2162–63; *Jones*, 526 U.S. at 249; *Almendarez-Torres*, 523 U.S. at 227.

2. Not only is the Ohio Supreme Court's decision a faithful interpretation of *Apprendi*, but it also makes good sense. The jury trial right is a collective, structural right predating our democracy. *Neder v. United States*, 527 U.S. 1, 30–31 (1999) (Scalia, J., dissenting in part and concurring in part) (noting that the jury trial right is "the only one to appear in both the body of the Constitution and the Bill of Rights," and "was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter"). It is "the grand bulwark" between the people and the police power of the State. 4 William Blackstone, Commentaries *342. *See* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398 (2009) (discussing history of the jury trial right as a "collective right"). It is thus a uniquely critical protection upon which the Ohio Supreme Court properly insisted before enhancing a defendant's sentence.

Moreover, the other procedural protections afforded juveniles are insufficient to ensure that the juvenile adjudication is sufficiently trustworthy and reliable. Unlike adult criminal proceedings, juvenile adjudications aim to be "intimate, informal protective proceeding[s]" with relaxed evidentiary rules. *McKeiver v. Pennsylvania*, 403 U.S. 528, 546 (1971). Judges in these proceedings are "exposed to far more prejudicial information about a youth" and his social background than would be allowed in a criminal trial, which in turn increases the likelihood of an adverse adjudication against the juvenile. Barry C. Feld, *Criminalizing Juvenile Justice: Rules*

of Procedure for the Juvenile Court, 69 MINN. L. REV. 141, 246 (1984). *See also Welch*, 604 F.3d at 432 (Posner, J., dissenting) ("Juvenile-court judges are exposed to inadmissible evidence; they hear the same stories from defendants over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust."). Furthermore, "the culture of the juvenile courts discourages zealous adversarial advocacy," and appeals are rare, likely owing to "heavy caseloads, a prevalent view that appeals undermine the rehabilitation process, and an absence of awareness among juveniles of their appeal rights." *Id.*

These procedural characteristics reflect the distinct purpose and character of the juvenile adjudication system, which is specifically designed "to avoid treatment of youngsters as criminals and insulate them from the reputation and answerability of criminals." *In re Agler*, 249 N.E.2d 808, 814 (Ohio 1969). Indeed, Ohio's juvenile code emphasizes rehabilitation and the interests of the juvenile offender. Ohio Rev. Code Ann. § 2152.01(A) (West 2016). *See also In re C.S.*, 874 N.E.2d 1177, 1184 (Ohio 2007) (noting that Ohio's juvenile courts "eschew[] traditional, objective criminal standards and retributive notions of justice"). By contrast, "[t]he overriding purposes of felony sentencing [in Ohio] are to protect the public from future crime by the offender and others and to punish the offender." Ohio Rev. Code Ann. § 2929.11(A) (West 2016).

Thus, "[w]hile it may be safe to assume that prior adult convictions are reliable because they contained

sufficient procedural safeguards, it is not safe to make this assumption with respect to juvenile adjudications." Jeremy W. Hochberg, *Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes?*, 45 WM. & MARY L. REV. 1159, 1180 (2004). *See generally* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007) (detailing numerous procedural deficiencies in juveniles courts which undermine the reliability of their proceedings). Given the distinctly civil character of the juvenile court system, and its concomitant informality, "[i]t is thus inconsistent to use less stringent procedures to obtain convictions in juvenile court in the name of rehabilitation, and then to use those same convictions to enhance subsequent criminal sentences as adults." Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1064 (1995).

3. Applying these principles here, the Ohio Supreme Court correctly held that Mr. Hand's juvenile adjudication could not be used to enhance his later sentence. In Ohio, as under the U.S. Constitution, juveniles do not have a right to a jury trial. *McKeiver*, 403 U.S. at 545; *In re Agler*, 249 N.E.2d at 813. Indeed, it is undisputed that Mr. Hand was not afforded the right to a jury trial in his juvenile adjudication. *See, e.g.*, App. 19a–20a. Accordingly, the *Apprendi* exception for prior convictions does not apply, and Ohio's juvenile adjudications may not be used to increase a sentence above a statutory maximum or elevate a mandatory minimum without being proven to the jury beyond a

reasonable doubt. *See Alleyne*, 133 S. Ct. at 2162–63; *Apprendi*, 530 U.S. at 496; *Jones*, 526 U.S. at 249; *Almendarez-Torres*, 523 U.S. at 227. *See also, e.g.*, *United States v. Tighe*, 266 F.3d 1187, 1194–95 (9th Cir. 2001) (holding same for purposes of sentencing enhancements under Armed Career Criminal Act).

4. Finally, the decision below was ultimately correct for another reason: *Almendarez-Torres* should be overturned, and if it were, the judgment below would be affirmed. *See Apprendi*, 530 U.S. at 489 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided."); *id.* at 499–523 (Thomas, J., concurring) (discussing how history of sentencing demonstrates flaws of *Almendarez-Torres*). The *Apprendi* exception for prior convictions exists solely because *Almendarez-Torres* held that prior convictions need not be charged in the indictment (and therefore, need not be proven beyond a reasonable doubt to a jury) before they could be used to increase a punishment beyond a statutory maximum. *See* 523 U.S. at 227. Thus, if *Almendarez-Torres* were overruled, no prior convictions—juvenile or otherwise—would fall outside of *Apprendi*'s rule. And if there were no such exception for prior convictions, Mr. Hand's juvenile adjudication—like all other facts—could not be used to enhance his sentence without a finding by the jury beyond a reasonable doubt. Because the Ohio Supreme Court's decision would be affirmed on this alternative ground, certiorari is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

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